

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATION BOARD  
REGION 9

RITE AID OF OHIO, INC.<sup>1/</sup>

Employer

and

Case 9-RC-17848

UNITED FOOD AND COMMERCIAL WORKERS,  
LOCAL UNION 1099, AFL-CIO, CLC

Petitioner

**ACTING REGIONAL DIRECTOR'S DECISION AND  
DIRECTION OF ELECTION**

**I. INTRODUCTION**

The Employer is engaged in the retail sale of pharmaceuticals and general merchandise at various retail locations throughout the United States including a store located at 3875 Salem Avenue, Dayton, Ohio, the only facility involved in this proceeding. The Petitioner has filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of the Employer's employees at this store. The parties agree that the unit appropriately consists of all full-time and regular part-time pharmacy techs and cashiers; excluding the store manager, the assistant store manager, the night/overnight managers, the pharmacy manager, the pharmacists, pharmacy interns and guards and supervisors as defined in the Act (the Unit). There is no history of collective bargaining affecting the employees involved in this proceeding.

The only issue on which the parties disagree is whether three shift supervisors should be excluded from the Unit. The Employer, contrary to the Petitioner, contends that the shift supervisors are supervisors within the meaning of Section 2(11) of the Act and therefore must be excluded. A hearing officer of the Board held a hearing on this issue and both parties filed briefs with me which I have carefully considered in reaching my decision.

The Employer essentially argues that the shift supervisors are statutory supervisors because they assign employees and responsibly direct their work, as well as because they may discipline or effectively recommend discipline. I have carefully considered the evidence and the arguments presented by the parties on this issue and have concluded that the Employer has not met its burden of establishing by the preponderance of the evidence that the shift supervisors are supervisors within the meaning of the Act. Thus, as discussed in more detail below, the

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<sup>1/</sup> The Employer's name appears as amended at hearing.

assignment and direction of employees is effectively performed by higher level management rather than the employees in issue and any direction that they give other employees is merely routine in nature and preordained by a task list developed by the store manager. Moreover, the shift supervisor is only in a position to report employee infractions, rather than to effectively recommend that any discipline be issued to an errant fellow employee and do not themselves engage in any discipline of employees.

To provide a context for my discussion of the issue, I will first provide a general overview of the Employer's operations. I will then present, in detail, the facts and reasoning that supports each of my conclusions on the issue.

## **II. OVERVIEW OF OPERATIONS**

The store involved in this proceeding encompasses a pharmacy area in the back of the facility that dispenses pharmaceuticals requiring a prescription, with the remainder of the store, referred to as the "front end," dedicated to general merchandise and non-prescription medications. The pharmacy area has two cash registers; the front end has five, one of which is in the photo area. The store is open 24 hours a day, but the pharmacy only 12.

Working at the facility are the store manager, an assistant store manager, two night/overnight managers, three shift supervisors, four cashiers, two pharmacists – one of whom is the pharmacy manager – and nine pharmacy techs. It appears that the operation of the pharmacy is left to the pharmacy manager, but the store manager is, in general, responsible for the overall operation of the facility. The parties are in agreement that the individuals with the term "manager" appearing in their titles are statutory supervisors. The parties agree that the pharmacists are appropriately excluded from the Unit, but it is unclear from the record whether their exclusion is based upon their supervisory status or their status as professionals.

It appears from the record that pharmacy techs work under the direction of the pharmacist on duty (although on occasion they are called upon to work a cash register in the front end of the store). It is noted that, other than with respect to medication issues, the pharmacists have no authority over front end employees. If the store manager is present, all employees, including cashiers, report to him. If the store manager is absent and the assistant manager present, all report to her. A cashier working with a night/overnight manager reports to him. If the managers are not present or are otherwise unavailable, the cashiers report to the shift supervisors.

Other than absences to perform errands, such as to go to the bank, there is a manager available at all times except for four evenings per week between 6 p.m. and 9 p.m. At these times, it appears that there is generally only one cashier working with a shift supervisor. In the absence of a manager, the shift supervisor is in "control" of the store and the cashier. In this connection, the shift supervisor is responsible for all sale transactions, reconciling cashiers' drawers, issuing refunds, voiding incorrect registry entries, authorizing different pricing than reflected in the code to conform to a publicized price, opening safes for the storage of cash, and "counting down" the cash to the manager coming on duty (assuring the accuracy of the amount of money for which the oncoming manager is assuming responsibility). In order to work with the registers on such issues as voiding sales and refunds, the shift supervisor is given a

management code not possessed by the cashiers. To deal with the storage of cash in the safes, the shift supervisors, unlike the cashiers, are given the safes' combination. The shift supervisors also have been given keys for the back door of the store that is used for deliveries, but apparently do not have keys to lock or open the customer entrance doors. Further, they may "check in" vendors. Unlike the cashiers, the shift supervisors have a code for the Employer's intranet communication system, referred to as "SYSM," which allows them, via the system, to authorize the payment of a store invoice. In addition, they handle customer complaints and are expected to call the authorities in a shoplifting situation.

It appears that when not working in the evening, the shift supervisors function much the same as any cashier – indeed until recently the shift supervisors at the store held the title of "key cashier." They may, however, have some additional responsibility for such matters as sending damaged product back and handling "plan-o-grams" (seasonal merchandizing displays). It has only been in the past year that the Employer changed the designation of these employees from "key cashier" to "shift supervisor." There is no indication, however, that their duties were changed at that time.

### **III. THE LAW AND ITS APPLICATION**

Before examining the specific duties and authority of the shift supervisors, I will review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of supervisor in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6<sup>th</sup> Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of "supervisory authority" in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 949 at fn. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the shift supervisors possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. *Id.*, at 1689. Such “minor supervisory duties” are not to deprive such individuals of the benefits of the Act. *NLRB v. Bell Aerospace, Co.*, 416 NLRB 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80<sup>th</sup> Cong. 1<sup>st</sup> Sess., at 4. In this regard the Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

The burden of proving supervisory status lies with the party asserting that such status exists. *Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. As a general matter, I observe that for a party to satisfy the burden of proving supervisory status, it must do so by “a preponderance of the credible evidence.” *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in the favor of the party who has the burden to persuade the [trier] of the fact’s existence.” *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, “[w]hen the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

Finally, although “supervisor” appears in the title of these employees, it is well established that job titles are not determinative of supervisory status under the Act. *John N. Hansen*, 293 NLRB 63, 64 (1989); *St. Alphonsus Hospital*, 261 NLRB 62, fn. 14 (1982); *The Washington Post Company*, 254 NLRB 168, fn. 22 (1981).

The Employer asserts that the shift supervisors possess certain of the indicia of statutory supervisors. Specifically, as I have previously noted, the Employer contends that the shift supervisors may discipline and effectively recommend the discipline of an employee and that they assign and responsibly direct employees. There is no contention or evidence that the shift supervisors have the authority to hire or discharge employees or possess any other indicia of supervisory authority. I will, in turn, consider each indicia of supervisory authority relied on by the Employer.

(a) **Disciplinary Authority**

The Employer contends that the shift supervisors have the authority to discipline or effectively recommend the discipline of the cashiers. For example, the store manager expects that if, in his absence, a cashier is not acting appropriately with a customer, a shift supervisor may pull the cashier aside to speak with them – “coach them” – and if the cashier refuses to listen to the shift supervisor, she may send the employee home. However, on the one occasion appearing in the record involving a situation where a shift supervisor sent an employee home (a situation involving the cashier claiming to have a gun), the store manager was consulted by telephone before the employee was sent home. Moreover, it is well established that the authority to send employees home for egregious or insubordinate behavior requires little independent judgment and does not confer supervisory authority. *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995); *Northcrest Nursing Home*, 313 NLRB 491, 506 (1993); *Great Lakes Towing Co.*, 165 NLRB 695 (1967). I also note that there is no indication that sending an employee home under such circumstances automatically results in job loss or even lost wages.

With respect to any “coaching” conducted by the shift supervisors directed at the cashiers, there is no evidence that such coaching, in any meaningful way, affects the coached employee’s job status or works to her detriment in any way. “[T]he power to ‘point out and correct deficiencies’ in the job performance of other employees ‘does not establish the authority to discipline.’” *Franklin Home Health Agency*, 337 NLRB No. 132 at slip op. 5 (2002), citing *Crittenton Hospital*, 328 NLRB 879 (1999). See also, *Ken-Crest Services*, 335 NLRB 777, 778 (2001); *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1139 (1999); *Ahrens Aircraft, Inc.*, 259 NLRB 839, 843 (1981).

The situations described in the record of shift supervisors bringing potential disciplinary issues to the attention of the store manager involved reporting cash shortages and absentee/tardiness type issues. Such a limited role in a potential disciplinary process as conveying information to higher management who will then themselves determine what action may be appropriate is considered nothing more than a reportorial function and is not indicative of supervisor status.<sup>2/</sup> *Ken-Crest Services*, supra. See also *VIP Health Services v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999) (mere reporting is insufficient to establish that nurses effectively recommended discharge or discipline); *RAHCO, Inc.*, 265 NLRB 235, 247-248 (1982) (record revealed employees were disciplined due to conduct attributed to them by assistant line supervisor, but in absence of effective recommendation of discipline his duties were mere monitoring which is not a manifestation of supervisory authority); *Artcraft Displays, Inc.*, 262 NLRB 1233, 1234-1235 (1982) (leadmen not supervisors even though they report employee problems to employer).

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<sup>2/</sup> The Employer notes in its brief that on one occasion a shift manager advised the store manager that she thought a cashier should be written up for being continually tardy. When she did so, however, she learned that the store manager had already disciplined the employee. I view this lack of consultation by the store manager with the shift manager before disciplining an individual who apparently worked under her as militating against a finding of supervisory status. Further, I do not find that this anecdotal evidence is sufficient to establish that shift supervisors have the authority to effectively recommend discipline within the meaning of Section 2(11) of the Act.

Accordingly, I conclude that the Employer has not established that the shift supervisors have the authority to discipline or effectively recommend discipline within the meaning of Section 2(11) of the Act.

**(b) Assignment and Direction of Employees**

The Employer emphasizes that with some regularity the shift supervisors are the highest authority in the store and implies that they must therefore be expected to possess the authority to assign and direct the work of any cashier who may be working with them. I am cognizant that for relatively short periods the shift supervisors are regularly the highest authority in the front end of the store. While it may be more likely that an individual left solely in charge of a facility has supervisory authority, it must be shown that the individual exercises independent judgment in significant personnel matters to confer statutory supervisor status. “[N]othing in the statutory definition of ‘supervisor’ implies that service as the highest ranking employee on sight requires [a] finding that such an employee must be a statutory supervisor.” *Ken-Crest Services*, 335 NLRB at fn 16. See also, *VIP Health Services v. NLRB*, 164 F.3d 644 , 649-650 (D.C. Cir. 1999) (stating that if an employee “do[es] not possess Section 2(11) supervisory authority, then the absence of anyone else with such authority does not automatically confer it); and *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983) (although evening and night shift “licensed practical nurses are the highest-ranking employees on the premises, this does not ipso facto make them supervisors.”)

With respect to the assignment of employees, the store manager schedules all employees. There is no indication the shift supervisors have any input into this process.<sup>3/</sup> It appears that when a shift supervisor may be left “in charge,” she has the authority to assign a cashier on a particular register – but it is unclear on what basis this is done. Moreover, the store manager makes out a task list indicating who will perform each task that needs to be performed that day – including providing such specific direction as who will straighten up the aisles and who will perform the placement of new items.

The record reflects, as noted above, that the cashier’s daily duties are contained on the task list. Other than what is contained on the task list, it appears that the cashier’s remaining duties are routine in nature. Specifically, the cashiers operate the register, keep the area around their area clean and replace items that have been brought to the register, but not purchased, to their proper location in the store.

It appears that in the absence of a manager, the shift supervisor makes sure the cashier carries out her duties. The store manager would expect the shift supervisors to “ask” the cashiers to perform such tasks as cleaning windows, stocking merchandise, straightening the merchandise aisles, etc. (presumably the tasks that he had set forth on the task list). Other than perhaps

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<sup>3/</sup> In its brief, the Employer asserts that shift supervisors have the authority to change work schedules if the store manager is not present and the need arises. This is apparently based on certain testimony of the store manager. In the portion of the transcript cited, however, it is noted that the store manager does not specifically describe the shift supervisors as having this authority.

“coaching” cashiers or sending them home (presumably for the store manager to deal with later) it is unclear what authority a shift supervisor has to enforce any instructions given to the cashier.

When left “in charge,” in what is described as the rare event of things being slow, the shift supervisor purportedly has the authority to send a cashier home. It is unclear, however, if this has ever actually occurred. If an employee is ill, she may allow the employee to go home. If another employee is needed, the shift supervisor may call and ask an employee to voluntarily come to work. However, the employee may decline and apparently the shift supervisor has no authority to order an employee to report to work. It is also questionable whether the shift supervisors even know they have the authority to request that an employee, who is off duty, voluntarily to report to work, without checking with a manager – at least one shift supervisor is unaware that she has this independent ability. It does not appear that the shift supervisor on duty has the authority to authorize overtime. It appears that a shift supervisor has, on at least one occasion, told an employee that she could not go home – but the reason the employee asked and what circumstances were involved is not known.

In the absence of a manager or the assistant manager the shift supervisor “determines when the cashier can take her breaks and can punch out.” No specific examples of this authority were provided. Further, the record does not reflect how much judgment, if any, is used by the shift supervisor when making these determinations. Breaks are to be assigned during convenient and slower periods. In an 8-hour shift, there are to be two 15 minute breaks and a half hour for lunch. Moreover, the record reflects that during those occasions when a shift supervisor is “in charge,” there would be only one cashier present. Thus, breaks would have to be arranged so either the shift supervisor or cashier would be on duty.

There is some dispute over whether the shift supervisor may formally excuse an employee’s tardiness or absence from work. Although it may be expected that the shift manager will only inform the manager if they deny the request, in the only examples appearing in the record, the shift supervisor merely passed on the message from such calls to the store manager; the shift supervisor involved never having been informed that shift supervisors could excuse an absence -- this despite the store manager’s general contention that the shift supervisor had, on some indeterminate occasion, excused an employee. I note in attempting to resolve this dispute that no formal documentation is generated by the shift supervisor by virtue of such a call.

Having carefully considered all the above facts, I am convinced that the shift supervisors are the type of minor functionaries that the drafters of the Act did not seek to disenfranchise and extant case law clearly supports such a conclusion. Thus, it has been recognized that when the direction of employees is circumscribed by detailed orders – such as the task lists compiled by the store manager found here – the degree of judgment of an individual overseeing the tasks falls below the threshold required to establish supervisory authority. *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 635 fn. 3, 669 (2001). See also, *Dynamic Science, Inc.*, 334 NLRB 391 (2001) (“test leaders’ role in directing employees” was “extremely limited and circumscribed by detailed orders and regulations issued by the employer and other standard operating procedures;” thus, the degree of independent judgment exercised by them “fell below the threshold required to establish statutory supervisory authority”); *Chevron Shipping Co.*,

317 NLRB 379, 381 (1995) (although second and third mates acting as watch officers were responsible for "directing the unlicensed employees, assigning tasks, and ensuring the safety of the ship and its cargo, their exercise of independent judgment was circumscribed by the master's standing orders and operating regulations).

Similarly, it appears that the duties of the cashiers are so routine that they require almost no direction. The oversight of the routine duties of others such as found here provides almost no room for discretion and thus does not require the independent judgment contemplated by Section 2(11) of the Act. *Evangelene of Natchitoches, Inc.* 323 NLRB 223, 223-224 (1997); *Azusa Ranch Market*, 321 NLRB 811, 812 (1996). Likewise, merely assuring that routine work is done, does not establish the requisite independent judgment necessary for a finding of supervisory status. *Palagonia Bakery Co.*, 339 NLRB No. 74, at slip op. 21 (2003).

Determinations involving such negligible judgment as assuring employees' breaks are taken during a non-busy period are considered to entail only routine, clerical judgments, not indicative of true supervisory status. *Azusa Ranch Market*, 321 NLRB at 812; *Parkview Manor*, 321 NLRB 477, 478 (1996). Similarly, the ability to allow an employee to absent herself from work if she becomes ill is considered to be a routine function, "requiring no independent judgment and insufficient to confer supervisory status. . . ." *D&F Industries, Inc.*, 339 NLRB No. 73, at slip op. 25 (2003), citing *Azusa Ranch Market*, 321 NLRB at 812, and *Sears Roebuck & Co.*, 304 NLRB at 197.

The mere fact that a shift supervisor may have not allowed an employee to leave early is as indicative of non-supervisory status as it is supervisory status in that the shift supervisor may have felt that she did not have the authority to allow the employee to stray from the schedule compiled by the store manager. The Employer has not met its burden to show otherwise.

Further, I note that there is no evidence that any shift supervisor has actually sent an employee home early because business was considered slow, or that shift supervisors have been advised that they have the ability to make this decision. The shift supervisor position description does not mention any such authority and there is no evidence of any written or orally disseminated policy giving them such authority. Since the record is devoid of a single example of such authority being exercised, I find that the Employer has not met its burden to show that it exists. *Michigan Masonic Home*, 332 NLRB at 1410. Even were I to conclude that the shift supervisors possessed such authority, it is considered the type of routine direction a nonsupervisory lead person might possess. *Smitty's Foods, Inc.*, 201 NLRB 283, 286 (1973).

With respect to the ability of a shift supervisor on her own authority to ask another employee to work, again I note that it appears questionable that the fact they have this authority was in any way actually made known to the shift supervisors. In any event, whether an employee works in response to a request by a shift supervisor is entirely up to the solicited employee. The ability to request, rather than direct, employees to work is not indicative of supervisory status. *D&F Industries, Inc.*, 339 NLRB No. 73, at slip op. 24 (2003); *English Lumber Company*, 106 NLRB 1152, 1153 (1953). See also, *Franklin Home Health Agency*, 337 NLRB at slip op. 5 (a nurses' reliance on volunteers and lack of authority to compel overtime work underlined the absence of supervisory power).



Supporting my conclusion that the shift supervisors are the type of lead person or straw boss who Congress did not intend to disenfranchise, is the fact that there is no evidence that the shift supervisors are held accountable for infractions or negligence of the cashiers who may be working under them. <sup>4/</sup> Where individuals are not held responsible for the conduct of those whose work they in some fashion direct, they are generally not found to be supervisors. See, e.g., *Northeast Utils. Serv. Corp. v. NLRB*, 35 F.3d 621, 625 (1st Cir. 1994) (“Finally, and most importantly, [purported supervisors] are simply not held accountable if a [subordinate] disobeys a direct order, misquotes a price or causes a blackout.”); *Franklin Home Health Agency*, 337 NLRB No. 132, slip op. at 6 (2002) (finding that RNs working for a home health agency were not supervisors in part because they were not accountable). Cf., *American Commercial Barge Line Co.*, 337 NLRB No. 168, slip op. at 2 (2002) (if a crew member on the towboat did something wrong during the pilot’s watch, the pilot was held responsible).

Finally, I note that with respect to the normal compliment of front end employees, if the shift supervisors are statutory supervisors, there is the overall ratio of seven statutory supervisors (four managers and three shift supervisors) to four cashiers. <sup>5/</sup> Although it is a so-called “secondary indicia,” the ratio of supervision to rank-and-file employees constitutes circumstantial evidence in analyzing an employer’s hierarchy and may shed light on the degree to which management has delegated authority to a particular individual. In the instant case, if the shift supervisors are Section 2(11) supervisors, the top-heavy ratio of statutory supervisors to non-supervisors (seven supervisors and four employees) offers circumstantial support to my conclusion that the shift supervisors do not possess or exercise supervisory authority as defined in Section 2(11) of the Act. *Franklin Hospital Medical Center*, 337 NLRB No. 132 (2002). See also, *Highland Superstores, Inc. v. NLRB*, 927 F.2d 918, 923 (6th Cir. 1991) (ratio of one supervisor for every two and a half employees was suspect); *Health Care Logistics*, 784 F.2d 232 (6<sup>th</sup> Cir. 1986) (three supervisors to seven or eight employees); *Ohio River Co.*, 303 NLRB 696, 719 (1991) (three supervisors, four dock crew members); *Austin Co.*, 77 NLRB 938, 943 fn.12 (1948) (relying on ratios, in part, in finding that individuals did not “responsibly direct” their work units; if the employer’s supervisory claim were upheld, the result would be that groups of 3 or 4 employees are directly supervised by 5 persons). <sup>6/</sup>

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<sup>4/</sup> The only written disciplinary warning appearing in the record in the instant case based on anything reported by a shift supervisor was issued to a cashier after a shift supervisor reported the cashier had two cash shortages. There is no indication that the shift supervisor was in anyway held responsible for her underling’s deficiency. Further, as noted earlier, there is no evidence that the shift supervisor effectively recommended the issuance of this discipline.

<sup>5/</sup> It appears that only on rare occasions does a pharmacy tech operate a front end cash register.

<sup>6/</sup> In its brief, the Employer requests that in accordance with the findings of “Region 19 in Rite Aid Corp./UFCW 367, 19-RC-14258,” that I find the shift supervisors to be statutory supervisors and exclude them from the unit. Although another Regional Director’s decision, which has not been specifically ruled on by the Board, may provide guidance in addressing an issue in a different Region, such a decision has no presidential impact. In any event, from a review of the decision in that case the individuals in dispute in 19-RC-14258 had more discretion in directing other employees than the record discloses that the shift supervisors exercise here.

#### IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussions above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

**All full-time and regular part-time pharmacy techs, cashiers and shift supervisors employed by the Employer at 3875 Salem Avenue, Dayton, Ohio store; but excluding the store manager, the assistant store manager, the night/overnight managers, the pharmacy manager, the pharmacists, pharmacy interns and all guards and supervisors as defined in the Act.**

#### V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the United Food and Commercial Workers, Local Union 1099, AFL-CIO, CLC. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

##### **A. VOTING ELIGIBILITY**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their

replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

## **B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **November 7, 2003**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

## **C. NOTICE OF POSTING OBLIGATIONS**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

## **VI. RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **November 14, 2003**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 31<sup>st</sup> day of October 2003.

/s/ Earl L. Ledford, Acting Regional Director

Earl L. Ledford, Acting Regional Director  
Region 9, National Labor Relations Board  
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### **Classification Index**

177-8520-0100  
177-8520-0800  
177-8520-1600  
177-8520-2400  
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177-8520-7870